Supreme Court, U.S.
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No. -

In The
Supreme Court of The United States
October Term, 2000

TERRY A. CARPENTER AND MARIA L. CARPENTER

Petitioners,

v.

PRODUCER SPORTFISHING INC., M/V PRODUCER, AND RAYMOND SOBIECK,

Respondents.

Petition For Writ of Certiorari
To The Court of Appeal of the State of California
Fourth Appellate District

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Whether a court on summary judgment can permissibly make factual determinations as to the existence and extent of an injured harborworker's fault to be 100%, thus preventing the jury from apportioning fault based on Comparative Negligence, in a 33 U.S.C. §905(b) negligence action?

LIST OF PARTIES

The names of all parties to the proceeding below are as follows:

Name	Capacity
Terry A. Carpenter	Plaintiff
Maria Carpenter	Plaintiff
Producer Sportfishing, Inc.	Defendant
M/V Producer	Defendant
Raymond Sobieck	Defendant
Gregg Hibbs	Defendant

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OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California for the Fourth Appellate District, Division One, filed April 4, 2000, the order denying rehearing thereon filed May 1, 2000, and the order of the Supreme Court of California, which declined review, filed July 12, 2000 are included herein at the Appendix, pages A-1 to A-15.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment below on April 4, 2000 (Appendix, page A-1) and further entered its order denying rehearing in the matter on May 1, 2000, at which time it modified its opinion (Appendix, page A-13). The Supreme Court of California declined review on July 12, 2000 (Appendix, page A-15). Petitioner has exhausted all

of his remedies in the State court. Therefore, the jurisdiction of this Court in invoked under 28 U.S.C. §1257.

STATEMENT OF THE CASE

Petitioner Terry A. Carpenter ("Petitioner") is a professional mechanic who specializes in engine and machinery repair work on commercial sportfishing and other commercial vessels. Respondent Producer Sportfishing, Inc., a California Corporation ("P.S.I.") owns and operates the M/V Producer ("vessel"), a 62-foot sportfishing boat. Respondent Raymond Sobieck is President of P.S.I and master of the vessel.

On August 5, 1996, P.S.I., acting as its own stevedore, hired Greg Hibbs (Hibbs), a specialist in marine electrical repairs, to obtain a replacement generator and replace a ruined generator aboard the vessel. On the morning of August 6th, Raymond Sobieck (Sobieck) hired Petitioner to replace an oil seal to the auxiliary engine that drives the generator, and to transport the 600-pound replacement generator from a nearby boatyard to the vessel.

Hibbs and crewman Chris Randel (Randel) disconnected the ruined generator from the auxiliary engine. Sobieck then ordered the starting power to the vessel's engines turned on, in order to move the vessel to another pier. The purpose was to use an overhanging gantry on that pier to facilitate removal of the ruined generator from the vessel engine room. After securing the vessel to the pier, however, Sobieck did not order the engine starting power turned off, and starting power to the auxiliary engine was left connected and active.

Petitioner arrived at the vessel for the first time on August 6th when Hibbs and vessel crewmen were removing the ruined generator from the vessel. Crewman Randel assisted Petitioner in removal and replacement of the auxiliary engine flywheel to service the oil seal, but did not inform Petitioner that the power was on.

Having completed the tasks assigned him, Petitioner prepared to leave the vessel, handing his tools to Sobieck on deck. Sobieck, however, directed Petitioner to continue working and attach the electrical generator to the auxiliary engine, because Hibbs had gone to lunch. Assisted by crewman Randel, Petitioner aligned the generator to the auxiliary engine. Petitioner and Randel were attaching interior bolts between the auxiliary engine and generator fan. Unaware the power was on, Petitioner inadvertently contacted the pushbutton starter button to the auxiliary engine. The engine started abruptly, severing three fingers and metacarpal portion of Petitioner's right hand.

On October 7, 1997, Petitioner filed a Complaint for Damages in the Superior Court of the State of California, San Diego Judicial District, against Producer Sportfishing Inc., M/V Producer, Raymond Sobieck, and Greg Hibbs d.b.a. San Diego Marine Electric Company, seeking to recover damages for injuries he sustained on the vessel. The complaint included a cause of action for loss of consortium on behalf of his wife, Maria L. Carpenter.

The complaint included a cause of action for vessel negligence pursuant to Section 905(b) of the Longshore Harbor Worker's Compensation act ("LHWCA"), found at 33 U.S.C. §901 et seq.

The LHWCA establishes a comprehensive workers compensation program that provides benefits and an exclusive remedy for longshore workers and other

harborworkers for work-related injuries suffered while working aboard vessels. *Howlett* v. *Birkdale Shipping Co.* (1994) 512 U.S. 92. This is a system of statutory benefits without regard to fault, typical of most other workers compensation programs.

However, the longshore worker also may seek damages in a third party negligence action against the owner of the vessel on which he was injured, on the limited grounds set forth in section 905. Section 905 actions against shipowners are available to both independent repairpersons working on vessels (such as Petitioner),'as well as longshore workers. *Cook v. Exxon Shipping Co.* (9th Cir. 1985) 762 F.2d 750, 752.

The vessel negligence section upon which Petitioner sued, 33 U.S.C. §905(b), provides as follows:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner,

> owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

The grounds for a third party negligence action pursuant to §905(b) were defined in *Scindia Steam Navigation Co. v. De Los Santos* (1981) 451 U.S. 156 ("Scindia"). In *Scindia*, the United States Supreme Court defined the duty of care a shipowner owes to longshore workers and vessel repairpersons under the LHWCA. The high court stated:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of 'reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman...It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing

> longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." (Id. at p. 167.)

These three narrow duties owed to longshore workers, including repairpersons such as the Petitioner, are known as the "turnover duty," the "active control duty," and the "duty to intervene." *(Howlett, supra,* 512 U.S. at p. 98.)

On August 21, 1998, the lower court granted summary judgment in favor of the vessel and its owners, finding that *no duty* was owed Petitioner under any of the duties set forth in *Scindia*, supra.

On the critical issue of "active control duty", the lower court stated:

> "First, the undisputed evidence demonstrates that P.S.I. was not in control of the repair operations at the time of the accident. Carpenter admitted he was an expert independent mechanic. P.S.I.'s owner was not in the engine room and did not direct the repair operations. Although a crewmember, Randel, was present to assist Carpenter, he was under Carpenter's control, and direction, not P.S.I.'s.
>
> Second, even if there were sufficient facts to create a triable issue as to control, Carpenter's claim fails for the same reason as it does under the turnover duty analysis. There was no duty to turn off the power or warn that it was not turned off."

The court's analysis of the duty issue as it related to "active control" mistakenly negate "duty" by concluding Petitioner to be at fault for his injury – by finding him guilty of what is tantamount to contributory negligence. The misapplication of the defenses of contributory negligence and assumption of the risk effectively shifted the burden of proof to Petitioner, a seriously injured harborworker, and denied him his right to a jury trial on all issues. The doctrines of Contributory Negligence and Assumption of the Risk were specifically rejected by Congress in 1972 as having no application to the LHWCA. See *Davis v. Portline Transportes Maritime* (3d. Cir.1994) 16 F. 3d. 532, at 543.

For the "active operations" duty and the "active control" duty to apply, it is not necessary that the vessel have "exclusive" control over the operations, only "substantial" control". In *Serbin v. Bora Corp., Ltd.*, 96 F.3d 66 (3rd Cir. 1996) the court encountered this situation and explained:

> "When, however, the hazard occurs due the vessel's active operations, as is plausibly the case here, it is no longer proper for the vessel to defer to the stevedore's expertise in handling cargo. The problem of apportioning responsibility between the vessel and stevedore by manipulating the vessel's standard of care to account for both entities disappears, because the vessel is in such events responsible for the injury, and liability, if any, should attach to it according to its comparative fault...*In short, unlike with the turnover duty, which generally applies to hidden defects in cargo areas, the vessel cannot rely on the stevedore's expertise to protect its workers from the vessel's active operations.* (at page 76).

Petitioner unsuccessfully made the following contentions in seeking to invoke the remedies available to injured harborworkers under the LHWCA:

(1) The Court's analysis of the "turnover duty" was irrelevant because Petitioner was never in "exclusive" control of the vessel, and the vessel was never "turned over" to him. Petitioner was hired to perform specific mechanical tasks, albeit related to the generator replacement job conducted by the independent electrician Hibbs and vessel crewmen;

(2) That the "active operations" duty was clearly operative under *Scindia* because the vessel's crewmen exerted substantial control over the vessel, and its electrical equipment, and Randel was in fact assisting Carpenter in doing the work leading to Petitioner's injury. The crewman's acts were both "active control" and "active involvement";

(3) Whether the crewman's failure to deactivate the electrical power, or warn Petitioner that it remained on constituted a breach of duty was a question for the jury under a comparative negligence analysis;

(4) The issue of Petitioner's comparative negligence in failing to ensure the electricity was off, before attaching the generator to the auxiliary engine was a question of fact for the jury, not the court;

(5) The court summarily avoided proper analysis of P.S.I.'s "Active Operations" and "Active Control" duties by determining that crewman Randel was under Petitioner's "control and direction, not P.S.I.'s". There is no authority or precedent for such a determination by the court.

(6) Apportionment of Fault, based upon Comparative Negligence is an issue of fact for jury determination in all cases where vessel "active operations" or "active control" is present, and even if the vessel "shares control" of the area or appliances that cause injury to the harborworker.

The Court of Appeal rejected all of the Petitioner's contentions, then summarily denied Petitioner's request for rehearing on May 1, 2000, at which time it modified its opinion as to the reason there was no duty of supervision. The California Supreme Court declined to review the case on July 12, 2000.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeal Was Erroneous:

Although the Court of Appeal recognized the application of a third party action for vessel negligence, its reasoning in negating the existence and scope of defendants' duty was necessarily an analysis and assessment of *Petitioner's* fault. In so doing, the court resolved questions of fact reserved for the jury - and deprived Petitioner of his rights under Section 905(b).

The Court adopted the trial court's selective use of portions of Petitioner's deposition testimony, to unfairly

conclude that Petitioner was 100% at fault for his own injury. Its treatment of the fault issue was tantamount to a contributory negligence and assumption of the risk analysis, neither of which defenses apply in a Section 905(b) negligence action. *Miller v. Patton-Tully Transp. Company, Inc.* 851 F.2d 326 (5th Cir. 1988). By doing so, the court was able to circumvent "factual" matters properly reserved for the trier of fact and improperly found that *no duty* was owed to Petitioner as a matter of law.

"In actions under this chapter (§905b), *whether*, and *to what extent* any (comparative) negligence of plaintiff should reduce his damages must be left to the jury for its determination." *Lopez v. A S D S Svenborg*, 581 F.2d 319 (C.A. NY 1978).

If the state court could not decide the issue of the existence and extent of Petitioner's fault, then it could only grant summary judgment by determining there was no duty. This is what the court did, and its discussion of the standard of review was as follows:

> "Summary judgment is appropriate only where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "On review of a summary judgment in favor of the defendant, we review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of a trial *(Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.) "

> "It has been recognized, however, that the existence and scope of a defendant's duty in negligence cases are issues amenable to summary judgment. *(Butcher v. Gay* (1994) 29 Cal.App. 4th 388, 400.)"

The duties under *Scindia* exist, but the state court found that none of the duties defined by this Court were breached. Under the facts of this case, it could not negate a finding of duty without extensively analyzing and assessing the degree of Petitioner's fault. Its analysis focused almost entirely on Petitioner's knowledge, his customary practices, and his conduct on that day - rather than upon what the vessel or its crewman did on that particular day. It concluded Petitioner was 100% at fault.

Petitioner submits that this analysis was a clear invasion of the province of the jury, and contrary to *Lopez*, supra, and *Miller v. Patton-Tully*, supra.

Although the state court found that the "turnover duty" had not been breached, that analysis is irrelevant without a vessel "turnover". Whether or not a turnover of "exclusive control" occurred in this case is a question of fact. Even assuming a turnover of exclusive control of the engine room occurred, the question of "active involvement" remains since crewman Randel remained involved with the work and the vessel's systems (it was the vessel's crewman who de-activated and activated the power).

The Court did not differentiate between the vessel duties owed under the Turnover Duty, with the more exacting duties owed under the Active Operations Duty, which requires that the harborworker have actual knowledge of the hazardous condition, "and must actually have appreciated the true significance (probability and gravity) of the threatened harm". *Davis v. Portline Transportes*

Maritime (3d. Cir.1994) 16 F. 3d. 532, at 543, and *Kirsch v. Plovidba* (3d. Cir. 1992) 971 F.2d 1026, at 1033.

This case involves questions concerning the vessel's negligence with respect to the active operations duty, and the doctrine of "pure" comparative fault that applies to Petitioner's §905(b) action. These questions should have been left for a jury to determine.

II. The Questions Presented Are Important:

The Congressional intent of the LHWCA is uniformity in the application of the general maritime law among the states. The Court's citation to state law conflicts with, and must yield to the general maritime law as it relates to the existence and scope of defendants' duty, and in consideration of all of the circumstances.

By erroneously applying state law to conclude that the vessel and its owners owed no duty to Petitioner as a matter of law, Petitioner, an independent marine engineer, was denied a trial and the express protections extended to all harborworkers, and secured in the *Scindia* "Active Involvement Duty" and "Active Control Duty."

There is a need for equal treatment of independent harborworkers under the LHWCA. The settled rules of law enunciated by the court in *Davis v. Portline Transportes Maritime*, supra, should be followed in this case. As a practical matter, the state court's decision should never be used to deprive a harborworker directly employed by a vessel of those rights and protections. The state court's decision creates an exception to settled rules of law intended to benefit harbor workers, nationwide. The act is designed to permit the injured harborworker to sue a negligent vessel owner for vessel negligence that causes injury.

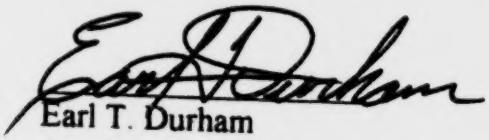
The injured harborworker should be able to rely upon the fact that settled rules or maritime law applicable to the vessel's "Active Involvement Duty" and "Active Control Duty" under *Scindia* will apply. If those duties are breached, the vessel is liable. It is then up to a *jury* to determine factual questions, such as apportionment of fault, not the court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Date: October 26, 2000

Respectfully submitted,



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(FILED APRIL 4, 2000)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TERRY A. CARPENTER et al., D032289

Plaintiffs and Appellants, (Super. Ct. No. 714696)

v.

PRODUCER SPORTFISHING, INC., et al.,

Defendants and Respondents.

APPEAL from a judgment of the Superior Court of San Diego County, S. Charles Wickersham, Judge. Affirmed.

In this action arising out of injuries suffered during repairs conducted on the engine of a fishing vessel, plaintiffs Terry A. Carpenter (Carpenter) and Maria Carpenter appeal from a summary judgment in favor of defendants Producer Sportfishing, Inc., and Raymond Sobieck (together P.S.I.). Carpenter was injured when he was installing a generator on P.S.I.'s vessel and the engine suddenly started, severing three of his fingers. Carpenter contends (1) the trial court erred in finding no duty was owed to Carpenter as a matter

of law, '2) P.S.I. owed Carpenter a duty as matter of law based upon federal law governing injuries to longshoreworkers, and (3) the court failed to base its decision upon any public policy or decisional grounds. We affirm.

FACTUAL BACKGROUND[1]

Carpenter is a professional mechanic who specializes in engine and machinery repair work on sportfishing and commercial vessels. Respondent P.S.I. owns and operates the M/V Producer, a 62-,foot sportfishing vessel upon which Carpenter was injured.

He was trained and educated in the field of mechanical engineering. Carpenter's job was to diagnose the vessel's engine and machinery problems and determine how to repair them. Carpenter had been hired on several occasions by P.S.I. to correct major engine or machinery problems on the M/V Producer. He was familiar with the vessel's electrical system, having worked on the vessel several times prior to the accident. He knew the location of the starter wire that he disconnected to snake sure the power was off before performing work. He also was familiar with the location of the shut-off switch for the generator engine. He knew the location of the starter button for the generator engine as he had inadvertently hit it on a previous occasion, which caused the engine to "jump."

In August 1996, P.S.I. contacted Greg Hibbs (Hibbs), a specialist in marine electrical repairs, to obtain a replacement Generator and replace a generator aboard the subject- vessel. P.S.I. also hired Carpenter to assist Hibbs in replacing and installing the new generator on the vessel.

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[1] In his briefs Carpenter for the most part does not cite to the relevant portions of the record. We ignore the references not supported by the record before the trial court.

After Hibbs located a replacement generator at a nearby shipyard, Carpenter went to the shipyard to retrieve it. Carpenter unbolted the replacement generator from its engine and brought it to P.S.I.'s vessel.

In the meantime, the vessel had been moved from its normal slip at- H&M Landing to the Red Rooster Pier, to unload the old generator. By the time Carpenter returned, Hibbs had disconnected the old generator from the M/V Producer and had gone to lunch. Hibbs planned to install the new generator after he returned from lunch as that was part of his job on the project. After removal of the old generator from the engine room, Carpenter descended and replaced the flywheel on the auxiliary engine.

After that task was complete, P.S.I. requested that Carpenter "couple" (bolt) the new generator to the engine as Hibbs had not returned from lunch. Carpenter agreed. Carpenter was experienced in this work as he had performed it on several occasions previously.

The vessel's owner did not enter the engine room while Carpenter was performing the coupling. Carpenter was not given any instructions or directions on how to conduct his work. Although crewmember Christopher Randel (Randel) assisted Carpenter in the coupling work, Randel took instructions from Carpenter as to the work to be performed.

Carpenter admits that it was his practice and duty before starting work on vessel engines to ensure the power was off by disconnecting the starter wire from the starter motor and turning the nearby electrical shut-off switch to the off position. He further admits he knew it was dangerous to perform the coupling task with the power turned on.

Carpenter always personally ensured the electrical power to any engine on which he was working was shut off. He would not rely on the vessel's crew to turn off the power for him. He also would not rely exclusively on electrical shut-off switches because he believed they were unreliable. Carpenter's practice (which he believed was safest) was to disable the power by disconnecting the starter wire between the starter solenoid and the starter motor of engines that he was repairing.

Nevertheless, on the date of the accident, Carpenter did none of these things. He did not check the shut-off switch to verify that the vessel's electrical power was off before he began work, nor did he disconnect the wire to the starter motor. .He did not ask anyone if the power was off. Carpenter admits his failure to take any of these precautions was a "lapse on" his part. Carpenter's only explanation for not taking his normal precautions was he "assumed" the power had been turned off because the other electrician Hibbs had been working on the engine before him.

Carpenter began attaching the generator, inserting his right hand between the fan blades to tighten several bolts. While doing this, he hit the starter button with his left elbow, causing the engine to start and the fan blades to sever three of his fingers and a portion of his hand.

PROCEDURAL BACKGROUND

Carpenter's complaint states two causes of action for negligence against P.S.I. and a single negligence count against Hibbs. The complaint also alleges a cause of action for spoliation of evidence. Carpenter's wife, Maria Carpenter, claims damages for loss of consortium against P.S.I. and Hibbs.

P.S.I. and Hibbs brought motions for summary judgment seeking dismissal of all causes of action stated in Carpenter's complaint. In August 1998, the superior court granted P.S.I.'s and Hibbs's motions. The court found that (1) P.S.I and Hibbs owed no duty to Carpenter as a matter of law, (2) the spoliation of evidence claim was barred under the holding of *Cedars-Sinai Medical Center v. Superior Court (1998)* 18 Cal.4th 1, and (3) Maria Carpenter's loss of consortium claim was derivative of Carpenter's negligence claims and thus barred. This timely appeal follows.[2]

STANDARD OF REVIEW

Summary judgment is appropriate only where there is no triable .issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "On review of a summary judgment in favor of the defendant, we review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of a trial *(Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673-674.) "Inasmuch as summary judgment is a drastic procedure and should be used with caution (citation], the moving party's pacers are strictly construed, while the opposing party's papers are liberally construed [citations]." *(Sanchez* v. *Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1465.)

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2 Carpenter does not contest the trial court's ruling on his claim for spoliation of evidence. Carpenter did appeal the judgment in favor of Hibbs. However, that appeal has since been dismissed pursuant to stipulation of the parties following a settlement.

It has been recognized, however, that the existence and scope of a defendant's duty in negligence cases are issues amenable to summary judgment. *(Butcher v. Gay* (1994) 29 Cal.App. 4th 388, 400.)

DISCUSSION

I. *Applicability of the Federal Longshore and Harbor Worker' Compensation Act*

Carpenter first contends that the court erred in finding that he was an independent contractor. Carpenter asserts he, as an employee of P.S.I., is subject to federal law governing negligence actions by longshore workers against vessels. P.S.I. contends that Carpenter was an independent contractor or, alternatively, if an employee, his claims still do not fall within the scope of federal longshore worker laws. We conclude the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 *U.S.C. §* 901 et seq.[3]) applies to this matter, regardless of whether Carpenter's status was as an independent contractor.

The LHWCA establishes a comprehensive workers compensation program that provides benefits and an exclusive remedy for longshore workers and other harbor workers for work-related injuries suffered while working aboard vessels. *(Howlett* v. *Birkdale Shipping Co.* (1994) 512 U.S. 92, 96 *(Howlett)* The employer must pay the statutory benefits regardless of fault,
but is shielded from any further liability to injured longshore workers. (ibid.) However, the longshore worker also may seek damages in a third party negligence action against the

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[3] All further statutory references are to title 33 of the United States Code.

owner of the vessel on which he was injured, pursuant to section 905 of the LHWCA. (Ibid.)[4]

Further, section 905 actions against shipowners are available to both independent repairpersons working on vessels (such as Carpenter),'as well as longshore workers. *(Cook v. Exxon Shipping Co.* (9th Cir. 1985) 762 F.2d 750, 752.) Thus, Carpenter's claim for negligence against shipowner P.S.I. is subject to the LHWCA, and, for the purposes of our analysis, we need not decide whether under the particular facts of this case Carpenter was an "independent contractor.[5]

II. *The Duty Issue.*

In *Scindia Steam Navigation Co. v. De Los Santos* (1981) 451 U.S. 156 (Scindia), the United States Supreme Court defined the duty of care a shipowner owes to longshore workers and vessel repairpersons under the LHWCA. The high court stated:

> "The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the

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[4] Section 905(b), states in part: "In the event of injury to person covered under this chapter caused by the negligence of vessel, then such person . . . may bring an action against such vessel as a third party . . . . The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

[5] The same factors relevant to an inquiry as to whether a person is acting as an independent contractor (i.e., degree of control of the employer) may also be relevant to an inquiry of whether a duty existed in this case. (See discussion, post.)

> stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of 'reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman...It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation." (Id. at -p. 167.)

Thus, the shipowner owes three narrow duties to longshore workers, known as the "turnover duty," the "active control duty," and the "duty to intervene." *(Howlett, supra,* 512 U.S. at p. 98.) These three duties are merely an expression of the generally recognized tort duty to exercise "ordinary care under the circumstances. *(Scindia, supra,* 451 U.S. at p. 166.) Accordingly, while section 905 cases are to be determined under federal law, ordinary principles of tort law govern. *(Scindia, supra,* at p. 166, 13.) They are to be analyzed under the general law governing alleged negligence by a landowner to third parties that come on their land. (ibid.)

Here, Carpenter contends that a triable issue of material fact exists as to whether P.S.I.'s actions implicated each (or any) of the three section 905 duties. Our application of relevant authority to the facts of this case confirms there was no duty under any of these theories.

A. *The Turnover Duty*

The "turnover duty" involves two separate obligations of the vessel owner. The first is to ensure the vessel is turned over in a reasonably safe condition such that "an expert and experienced contractor *(Scindia, supra,* 451 U.S. at p. 167) who is mindful of the dangers he should reasonably expect to encounter" *(Marine Terminals v. Shipping Co.* (1969) 394 U.S. 404, 416, fn. 18) , will be able to operate -with reasonable safety. Second, there is an obligation to warn the contractor of latent defects existing on the vessel that "would not be obvious to or anticipated by him if reasonably competent in the performance of his work." *(Scindia, supra,* at p. 167.)

With respect to the turnover duty, Carpenter contends P.S.I. either owed a duty to turn off the power prior to his commencing work or to warn him the power was not turned off. We reject this contention.

Carpenter, an expert independent mechanic, admitted in his deposition that it was his duty and consistent practice to ensure that power was turned off before he commenced engine work on vessels. He never relied on others to accomplish this task, but always personally checked to make sure the power was off. The location of the power switch and starter wire were known to Carpenter, based upon his previous work on this vessel, and were readily accessible.

Based upon these undisputed facts, there was nothing inherently unsafe about the condition of the vessel at the time of the turnover, nor was the hook-up of the vessel's power a latent danger that should have been brought to Carpenter's attention. To the contrary, the vessel's power was an obvious danger that Carpenter himself admits he knew or, at a minimum, should have known. Under such facts, there is no turnover duty.*(Quevedo v. Trans-Pacific*

Shipping, Inc. (9th Cir. 1998) 143 F.3d 1255, 1258-1259.) A shipowner such as P.S.I. is entitled to expect that an expert, independent mechanic such as Carpenter, would perform with reasonable competence"' to ensure his own safety. *(Howlett, supra,* 512 U.S. at p. 101.) By Carpenter's own admission this means, at a minimum, ensuring the power is turned off before commencing work. In his deposition testimony Carpenter refers to his departure from this standard practice as a "lapse" on his part. We conclude there was no turnover duty under these facts. [6]

Carpenter justifies his actions, and attempts to create a duty, based upon the fact he "assumed" the power was off because his partner Hibbs had been working ahead of him. This does not change the result. Any negligence or failure co warn on the part- of Hibbs, himself an independent mechanic, is not chargeable to *P.S.I. P.S.I.* had no more duty co ensure Hibbs had turned off the power than it did to ensure Carpenter had done so. Absent evidence of actual knowledge that the power was on, there is no basis to impose a duty of supervision or Inspection on vessel owners to protect experienced repairpersons areas within their expertise A vessel owner has no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the operations that are assigned to the [repairperson]." *(Scindia, supra,* 451 U.S. at p. 172.)

B. *The Active Control Duty*

The "active control duty" requires a shipowner to exercise reasonable care to prevent injuries in areas that remain under the "active control of the vessel. *(Scindia,*

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[6] Carpenter also takes issue with the location of the starter button he bumped against, which caused the engine to engage, resulting in his injury. We address this allegation separately. (See part II(D), *post.)*

supra, 451 U.S. at c. 167.) A shipowner (does not owe a duty in work areas turned over to a repairperson. *(Manuel v. Cameron Offshore Boats, Inc.* (5th Cir. 1997) 103 F.3d 31, 34.) Carpenter's case fails under this theory for two reasons.

First, the undisputed evidence demonstrates that P.S.I. was not in control of the repair operations at the time of the accident. Carpenter admitted he was an expert independent mechanic. P.S.I.'s owner was not in the engine room and did not direct the repair operations. Although a crewmember, Randel, was present to assist Carpenter, he was under Carpenter's control, and direction, not P.S.I.'s.

Second, even if there were sufficient facts to create a triable issue as to control, Carpenter's claim fails for the same reason as it does under the turnover duty analysis. There was no duty to turn off the power or warn that it was not turned off.

C. *The Duty To Intervene*

Once the repairperson's work has begun, there exists a very narrow "duty to intervene, 11 which is only triggered when (1) the vessel owner is aware of a dangerous condition; (2) the vessel owner should realize the condition presents an unreasonable risk of harm; and (3) the vessel owner knows that the worker himself has failed to remedy the situation. *(Bjaranson v. Botelho Shipping Corp., Manila* (9th Cir. 1989) 873 F.2d 1204, 1207.)

Here, there is no evidence that P.S.I knew that Carpenter had failed to turn off the power, that an unreasonably dangerous condition existed on the vessel, or that Carpenter had failed to remedy the problem. Under such facts, the duty to intervene is not triggered. *(Bjaranson v. Botelho Shipping Corp., Manila,* supra, 873 F.2d at p. 1209.)

D. Application of Occupational Safety and Health Administration (OSHA) *and United States Coast Guard (Coast Guard) Regulations*

Carpenter asserts the position of the starter button that caused the engine to engage violated Coast Guard regulations, and P.S.I. failed to follow OSHA "lockout and tagging procedures"[7] thereby subjecting P.S.I. to liability under the negligence per se doctrine. We reject these arguments for several reasons.

First, it is proper for the trier of fact to consider applicable safety regulations promulgated by OSHA and the Coast Guard in deciding whether the condition of a vessel created an unreasonable risk of harm to others. (See *Martinez v. Korea Shipping Corp.*, Ltd. (9th Cir. 1990) 903 657 F.2d 606, 611.) However, such regulations do not automatically create a duty and make a vessel owner subject to the doctrine of negligence per se if they are violated. *(Davis v. Partenreederei M.S. Normannia* (9th Cir. 1981) 657 F.2d 1048, 1053.)

Second, Carpenter failed to submit any evidence that the position of the starter switch or the failure to utilize a lockout and tagging procedure, based upon applicable regulations or other evidence, created a duty on behalf of P.S.I. As already discussed, Carpenter was aware of the location of the starter switch. He also admitted he alone was responsible for shutting off the power. There is no evidence to show that either the position of the starter switch, or the

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[7] The federal OSHA "lockout and tagging procedures" are found in 29 Code of Federal Regulations parts 1910.333 (1994) and 1926.417 (1999)

failure to utilize lockout and tagging procedures created an unreasonably dangerous condition.

In fact, the only competent evidence submitted on this issue was an expert declaration submitted by P.S.I that the location of the starter switch was appropriate, that OSHA regulations did not apply, and that OSHA regulations were not -Isolated. In response Carpenter submitted no expert declaration or other competent evidence to contradict this testimony. Accordingly, the court was entitled to accept this testimony as undisputed evidence on this issue. *(Ochoa v.* Pacific Gas Electric Co. (1998) 61 Cal.App.4th 1480, 1487.)

Third, Carpenter has not cited to a particular Coast Guard regulation that P.S.I allegedly violated. Rather, he merely cited to general safety guidelines without demonstrating how they apply or were violated in this case.

Last, the cited OSHA regulations are not applicable as a matter of law as they are written for construction, not ship repair, and do not apply to longshoring. (See 29 C.F.R. §§ 1926.1 (1999) & 1918.1 (1999).) Applicable safety regulations for ship repairing are found in 29 Code of Federal Regulations part 1915.4 (1999). They are also inapplicable to Coast Guard-inspected vessels such as P.S.I.'s, as the Coast Guard has already asserted authority over safety standards for such vessels. (29 *U.S. C.* § 653 (b) (1) ; 29 C. F. R. § *1910 - 5 (b)* (1993).)

In sum, under the f acts of this case P.S.I. owed no duty to Carpenter as a matter of law to ensure that Carpenter was protected against injury arising out of the accidental starting of the vessel's engine during his repair work. Further, safety regulations cited by Carpenter do not create a

duty on behalf of or provide a basis for liability under the circumstances of the instant case.[8]

DISPOSITION

The judgment is affirmed. Appellant shall pay respondents' costs on appeal.

NARES, J.

WE CONCUR:

WORK, Acting P.J.
O'ROURKE, J.

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[8] Because appellant Maria Carpenter's action for loss of consortium is dependent of Mr. Carpenter's claims, that action is also barred and we need not address the arguments related to that claim

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE **(FILED MAY 1 - 2000)**

STATE OF CALIFORNIA

TERRY A. CARPENTER et al., D032289

Plaintiffs and Appellants, (Super. Ct. No. 714696)

v.

PRODUCER SPORTFISHING, INC., et al. ORDER MODIFYING OPINION AND DENYING REHEARING

Defendants and Respondents. [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 4, 2000, be modified as follows:

1. On page 12, the fourth full sentence is modified to read as follows:

> Absent evidence of actual knowledge that the power was on at the time Carpenter began work, there is no basis to impose a duty of supervision on vessel owners to protect

experienced repairpersons in areas within their expertise.

There is no change in the judgment.

The petition for rehearing is denied.

WORK, Acting P.J.

Copies to: All parties

**(SUPREME COURT
FILED JUL 12 2000)**

**(COURT OF APPEAL
FILED JUL 19 2000)**

Court of Appeal, Fourth Appellate Dist.,Divis. One No. D032289

S088352

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TERRY A. CARPENTER et. al.; Appellants,

v.

PRODUCER SPORTFISHING, INC. et al, Respondents.

Petition for review DENIED.

GEORGE, Chief Justice